q5

Supreme Court, U.S.
FILED

071550 JUN 12 2008

OFFICE OF THE CLERK

No. 07-1550

IN THE
Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T TEXAS,
Petitioner,

v.

TEXAS CABLE ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAVIER AGUILAR
TRACY TURNER
AT&T SERVICES, INC.
175 E. Houston
San Antonio, Texas 78205
(210) 351-3428

MICHAEL K. KELLOGG
Counsel of Record
COLIN S. STRETCH
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

June 12, 2008

QUESTION PRESENTED

Whether a plaintiff association purporting to challenge the validity of a state statute in all its applications to all its members must — under the rule announced in *United States v. Salerno*, 481 U.S. 739, 745 (1987) — allege that "no set of circumstances exists" under which the challenged statute could lawfully be applied to the association's members.

PARTIES TO THE PROCEEDINGS

Petitioner Southwestern Bell Telephone Company d/b/a AT&T Texas (formerly known as Southwestern Bell Telephone, L.P. d/b/a SBC Texas) was an intervenor-defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Respondent Texas Cable Association (formerly known as Texas Cable & Telecommunications Association) was the plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Texas Coalition of Cities for Utility Issues, GTE Southwest Inc. d/b/a Verizon Southwest, and Grande Communications Networks Inc. were intervenor-defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Paul Hudson, in his official capacity as Chairman of the Public Utility Commission of Texas ("Texas PUC"), and Julie Parsley and Barry Smitherman, in their official capacities as Commissioners of the Texas PUC, were defendants in the district court proceedings and appellees in the court of appeals proceedings. At the present time, Mr. Smitherman is the Chairman of the Texas PUC and Mr. Hudson is a Commissioner of the Texas PUC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southwestern Bell Telephone Company d/b/a AT&T Texas (formerly known as Southwestern Bell Telephone, L.P. d/b/a SBC Texas) states the following:

Southwestern Bell Telephone Company d/b/a AT&T Texas is a wholly owned, indirect subsidiary of AT&T Inc., which is a publicly held company. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

During the pendency of the proceedings before the district court and the court of appeals, petitioner was organized as a limited partnership known formally as Southwestern Bell Telephone, L.P. Beginning on June 21, 2007, the limited partnership was discontinued and it became a Missouri corporation known formally as Southwestern Bell Telephone Company.

Petitioner here refers to itself by its trade name, AT&T Texas.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Municipal Franchising And Congress's Efforts To Promote Video Competition 2

B. The Texas Legislature's Efforts To Promote Video Competition 5

C. The Proceedings Below 8

REASONS FOR GRANTING THE PETITION 11

I. THE COURTS OF APPEALS ARE DIVIDED ON THE APPLICATION AND VITALITY OF *SALERNO*'S LEGAL STANDARD 11

A. The Decision Below Conflicts With Decisions Of The Second And Eleventh Circuits 12

B. The Decision Below Deepens Confusion In The Federal Courts Regarding *Salerno* 15

II. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND WITH THE PURPOSES UNDERLYING FACIAL-CHALLENGE RULES 17

A. The Decision Below Conflicts With Decisions Of This Court 17

B. The Fifth Circuit Erred In Concluding That *Salerno*'s Standard Is Nothing More Than A Limit On Third-Party Standing 21

III. THE LEGAL ISSUE RAISED BY THE PETITION IS IMPORTANT AND IS PROPERLY ADDRESSED NOW 24

IV. ALTERNATIVELY, THE COURT SHOULD VACATE AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *WASHINGTON STATE GRANGE* 28

CONCLUSION 29

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. 06-51514 (Feb. 7, 2008) 1a

Order of the United States District Court for the Western District of Texas, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. A 05 CA 721 LY (Sept. 28, 2006) 18a

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. 06-51514 (Mar. 14, 2008) 27a

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc, *Texas Cable & Telecomms. Ass'n v. Hudson, et al.*, No. 06-51514 (Mar. 14, 2008) ... 29a

Constitutional and Statutory Provisions Involved:

U.S. Const.:

Art. VI, cl. 2 (Supremacy Clause) 31a

Amend. I (Free Speech Clause) 31a

Amend. XIV, § 1:

Due Process Clause 31a

Equal Protection Clause 31a

Communications Act of 1934, § 621, 47 U.S.C. § 541 ..... 32a

Texas Util. Code Ann. §§ 66.001-66.016 ..... 37a

TABLE OF AUTHORITIES

Page

CASES

Arriaga v. Mukasey, 521 F.3d 219 (2d Cir. 2008) 22

Ayotte v. Planned Parenthood, 546 U.S. 320 (2006) 18, 20, 24

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 27

City of Chicago v. Morales, 527 U.S. 41 (1999) 10, 12, 15, 16, 17, 22, 26

Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) 29

Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002) 21

Doctor John's, Inc. v. City of Roy, 465 F.3d 1150 (10th Cir. 2006) 16

Georgia Cemetery Association, Inc. v. Cox, 353 F.3d 1319 (11th Cir. 2003) 13, 14

Hotel & Motel Ass'n v. City of Oakland, 344 F.3d 959 (9th Cir. 2003) 12

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 17

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 21

Nichols v. United States, 511 U.S. 738 (1994) 17

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) 22

Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591 (2d Cir. 1993) 12, 13, 18, 19, 22

Rothe Dev. Corp. v. Department of Defense, 413 F.3d 1327 (Fed. Cir. 2005) 16

Sabri v. United States, 541 U.S. 600 (2004) 18

Sanitation & Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997) 21

Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 2007) 16

Simon v. Cook, 261 F. App'x 873 (6th Cir. 2008) 12

Smith v. United States, 502 U.S. 1017 (1991) 27

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 27

United States v. Raines, 362 U.S. 17 (1960) 26

United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) 16-17

United States v. Salerno, 481 U.S. 739 (1987) 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28

United States v. Shrake, 515 F.3d 743 (7th Cir. 2008) 16

Washington v. Glucksberg, 521 U.S. 702 (1997) 26

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184 (2008) 23, 23, 28, 29

Watson v. Philip Morris Cos., 127 S. Ct. 2301 (2007) 27

Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912) 26

ADMINISTRATIVE DECISIONS

Report, *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (1990) 3

Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) 4

Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087 (2006) 4

STATUTES AND RULES

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ..... 2, 3, 7

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 3

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 1

47 U.S.C. § 521(6) 3

47 U.S.C. § 522(10) 2

47 U.S.C. §§ 541-547 3

47 U.S.C. § 541(a)(1) 3

47 U.S.C. § 541(a)(4) 3

47 U.S.C. § 543(a)(2) 3
47 U.S.C. § 543(*l*)(1) 3
47 U.S.C. § 556(c) 3
47 U.S.C. § 557(a) 3
28 U.S.C. § 1254(1) 1
Georgia Cemetery and Funeral Services Act of 2000, Ga. Code Ann. § 10-14-1 *et seq.* 13
Tex. Transp. Code Ann. § 311.071(a) 5
Tex Util. Code Ann.:
§ 66.002(3) 6
§ 66.002(7) 7
§ 66.002(11) 6
§ 66.003 6
§ 66.003(b) 6
§ 66.004 7
§ 66.004(b) 8
§ 66.004(c) 8
§ 66.005(a) 19
§ 66.010 6
§ 181.102 5
Fed. R. App. P. 32.1 27
5th Cir. R. 28.7 27

LEGISLATIVE MATERIALS

Hearing Before Senate Chamber Comm., Bus. & Commerce Comm., 79th Leg. (Tex. June 27, 2005) 5

Hearing on Bill SB.21, 79th Leg. (Tex. Sept. 27, 2005) 5

S. 5, 79th Leg., 2nd C.S. (Tex. 2005) 5, 6, 7, 8, 9, 10, 11, 12, 15, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29

Transcript of Proceedings Before the Texas House of Representatives, 79th Leg. (Aug. 9, 2005) 7

Transcript of Proceedings Before the Texas Senate, 79th Leg. (Aug. 9, 2005) 6, 19

OTHER MATERIALS

David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333 (2005) 25

James C. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* (rev. ed. 2006) 2

Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359 (1998) 24

Perryman Group, *An Assessment of the Impact of Competition in the Delivery of Wireline Video Services on Business Activity in Texas* (July 2005) 5, 6, 20

Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002) 26

Southwestern Bell Telephone Company d/b/a AT&T Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not reported (but is available at 2008 WL 344757). The opinion of the district court (Pet. App. 18a-26a) is reported at 458 F. Supp. 2d 309.

JURISDICTION

The court of appeals entered its judgment on February 7, 2008. Timely petitions for rehearing and rehearing en banc were denied on March 14, 2008. *See* Pet. App. 27a-30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of United States Constitution, the Communications Act of 1934, and the Texas Utilities Code are set forth at Pet. App. 31a-61a.

STATEMENT OF THE CASE

This case involves the scope and application of *United States v. Salerno*, 481 U.S. 739 (1987). The court below held that the rule announced in *Salerno* — that a party raising a facial challenge "must establish that no set of circumstances exists under which the [challenged statute] would be valid," *id.* at 745 — is merely a rule of third-party standing that does not apply when a plaintiff association purports to seek relief only on behalf of its members. With that justification, the Fifth Circuit allowed the plaintiff association in this case to challenge the validity of a Texas video franchising statute in all its applications

to all the association's members even though the association had not — and could not have — alleged that the statute is unlawful in all applications to the association's members. The Fifth Circuit's decision conflicts with decisions of the Second and Eleventh Circuits, which have held that *Salerno* requires an association launching such a challenge to allege that a statute is unlawful in all applications to all its members.

A. Municipal Franchising And Congress's Efforts To Promote Video Competition

1. From the early years of cable television, local franchising has operated as a barrier to entry. Franchising authorities "quickly understood that if just one franchise were granted, it would be a valuable commodity for which the city could obtain a high price." James C. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* § 4.02[1] (rev. ed. 2006). For that reason, cable franchises were typically granted on an exclusive basis, and franchising authorities demanded correlative payments or other benefits from a franchisee. *See id.* Because franchising authorities generally lacked "established or uniform decision-making criteria," the franchising process was "relative chaos." *Id.*

Congress first addressed cable franchising in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act"). The 1984 Cable Act provided that "franchising authorit[ies]" — defined as the "governmental entit[ies] empowered by Federal, State, or local law to grant a [cable] franchise," 47 U.S.C. § 522(10) — may award "1 or more" franchises to cable operators for their provision of cable services, but must do so in accordance with requirements set out in the 1984

Cable Act. *See id.* §§ 541-547. Moreover, the 1984 Cable Act preempted state or local franchising laws or requirements that are inconsistent with federal communications law. *See id.* § 556(c).

One of Congress's stated goals in enacting the 1984 Cable Act was to "promote competition in cable communications and minimize unnecessary regulation." *Id.* § 521(6). Yet, as the Federal Communications Commission ("FCC") found, local franchising, even as constrained by the 1984 Cable Act, contributed to the lack of competition by establishing legal exclusivity and imposing entry requirements that were sustainable only for a monopoly operator.[1]

Congress adopted a different approach to local franchising in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"). The 1992 Cable Act prohibited franchising authorities from awarding an "exclusive franchise" for cable service or "unreasonably refus[ing] to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). Congress also codified factors on which franchising authorities could and could not rely in refusing to grant a franchise application. *See id.* § 541(a)(4).

2. Despite Congress's market-opening efforts, incumbent cable operators still face only limited competition. Although cable operators can avoid rate regulation of their basic service tier if they obtain a determination by the FCC that they are subject to "effective competition," 47 U.S.C. § 543(a)(2), (*l*)(1), less than 4% of cable systems in the United States

---

[1] *See* Report, *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶¶ 134-135, 141-142 (1990).

have persuaded the FCC that they face such competitive pressure, *see* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087, ¶ 3 (2006) (cable operators face effective competition in 1,128 communities, while 31,655 communities lack such competition).

In the absence of competition, cable incumbents have consistently raised rates. Cable prices on the whole increased more than 5% in 2005 and by 93% in the preceding decade. *See id.* ¶ 2. Prices for the commonly sold "expanded basic" cable service increased twice as fast as inflation. *See id.* As the FCC recently summarized, "[m]ost communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service." *Section 621 Order*[2] ¶ 19. This continuing "dearth of competition is due, at least in part, to the [local] franchising process." *Id.* ¶ 20.

The FCC has observed, however, that a number of States, including Texas through the legislation at issue in this case, have reformed the franchising process in their States. Such "state level franchising," the FCC has concluded, "may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas." *Id.* ¶ 14 n.38.

---

[2] Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) ("*Section 621 Order*").

B. The Texas Legislature's Efforts To Promote Video Competition

This case involves a challenge to Texas's precedent-setting franchising reform statute. Prior to the enactment of that statute, Texas vested cable franchising authority in individual municipalities. *See* Tex. Transp. Code Ann. § 311.071(a); Tex Util. Code Ann. § 181.102. Under the municipal franchising process, a new cable entrant was forced to engage in costly and time-consuming negotiations with each municipality in which it wanted to provide cable service. If the new entrant wanted to offer cable service statewide, it would thus have to negotiate hundreds of municipal agreements. By 2005, this local franchising process had become the "biggest concern" of those in Texas who sought to promote video competition. Hearing Before Senate Chamber Comm., Bus. & Commerce Comm. at 5 (June 27, 2005) (Doc. No. 15,[3] Exh. 6) (statement of Snapper Carr, Legislative Counsel for Texas Municipal League).

The Texas Legislature responded by enacting Senate Bill 5 ("SB 5"). The Legislature had before it — "on [the] desk" of each legislator, *see* Hearing on Bill SB.21, at 2 (Sept. 27, 2005) (Doc. No. 15, Exh. 3) (statement of Rep. King) — a report documenting both the absence of video competition in Texas and the substantial benefits competition would bring. *See* Perryman Group, *An Assessment of the Impact of Competition in the Delivery of Wireline Video Services on Business Activity in Texas* (July 2005) ("*Perryman Report*") (Doc. No. 15, Exh. 4). The report confirmed that cable providers enjoy dominant market positions

---

[3] "Doc. No. 15" refers to AT&T Texas's Motion To Dismiss (and attachments thereto) filed in the district court on November 10, 2005.

across Texas: "about 92% (684 out of 744) of the cable-served communities have only one available cable television operator." *Id.* at 8. The report noted that the minimal entry in Texas by existing competitive cable operators, known as "overbuilders," was consistent with national data. *Id.* The report identified municipal franchising as one reason for the dearth of competition. Local franchising, the report stated, contributed to a "cumbersome and inefficient market entry mechanism" that "precludes substantial and rapid investment by other wireline . . . providers." *Id.* at 12.

The Texas Legislature determined that state-level franchising would "give [consumers more] choices" in video services and "lower [cable] prices." Transcript of Proceedings Before the Texas Senate at 6 (Aug. 9, 2005) (Doc. No. 15, Exh. 5) (statement of Sen. Fraser). It created SB 5 to streamline the video franchising process under which cable operators and other video providers that require permission to use public rights-of-way may apply immediately to the Public Utility Commission of Texas ("Texas PUC") for a video franchise in service areas they designate. *See* Tex. Util. Code Ann. §§ 66.002(3) & (11), 66.003. Franchises are issued on an expedited schedule to eligible providers. *See id.* § 66.003(b). Once a video provider obtains a state franchise, it need not seek a municipal franchise for any service area covered by the state authorization. *See id.* §§ 66.003, 66.010.

In enacting SB 5, the Texas Legislature sought to balance the goal of promoting competition with municipalities' reliance on existing, voluntarily negotiated franchises. Such franchises typically provided for the payment of franchisee fees and the provision of other benefits (such as institutional network

support) to municipalities. To protect municipalities' reliance interests, SB 5 grandfathers existing agreements. SB 5 permits all new entrants in any service area — including providers that are incumbents elsewhere — immediately to apply for a state-issued franchise for that area. Under the grandfathering provision, however, an incumbent cable operator providing service under an existing municipal franchise agreement may obtain a state-issued franchise for the area covered by the existing franchise agreement only after the agreement expires (or is terminated by mutual agreement). *See id.* §§ 66.002(7), 66.004. Through that provision, much like a similar provision of the federal 1984 Cable Act, *see* 47 U.S.C. § 557(a), the Texas Legislature sought to ensure that disruption to municipalities would be kept to a minimum. *See* Transcript of Proceedings Before the Texas House of Representatives at 36 (Aug. 9, 2005) ("House Floor Debate") (Doc. No. 15, Exh. 7) (statement of Rep. King) (existing agreements were "grandfather[ed]" "to give . . . cities a comfort level and allow the process of deregulation to ease in for them").

The Texas Legislature reached a different conclusion with respect to existing overbuilders. The Legislature concluded, based on the legislative record before it, that the competitive characteristics of overbuilders resembled those of new entrants more than those of incumbents and that municipalities were less reliant on overbuilders' existing franchise agreements. The Legislature accordingly allowed overbuilders with less than 40% market penetration in a particular municipal franchise area to opt out of their existing municipal franchise agreement with that

municipality by January 2006. *See* Texas Util. Code Ann. § 66.004(b), (c).

C. The Proceedings Below

1. Respondent Texas Cable Association (formerly known as Texas Cable & Telecommunications Association) ("TCTA")[4] is a trade association representing incumbent cable operators in Texas. The day after SB 5 became law, TCTA initiated a facial challenge to the statute, claiming that, by allowing overbuilders but not incumbents to abrogate their existing agreements and to obtain immediately state-issued franchises, the statute "discriminates" in violation of federal statutory and constitutional law. First Am. Compl. ¶ 1 (Jan. 20, 2006). Central to its discrimination claim was TCTA's allegation that obligations imposed by state franchises are "less onerous than the burdens that municipal franchises generally impose on [incumbents]." *Id.* ¶ 22; *see id.* ¶¶ 20, 31.

TCTA seeks an across-the-board remedy that would allow "incumbent cable operators . . . to renounce their municipal franchises and apply for [state]-issued franchises." TCTA Br. in Opp. to Motions To Dismiss 13 (Jan. 17, 2006); *see id.* at 16-17 ("[T]he question is not whether there is a proper justification for moving franchising to the state level — the question is whether there is a proper justification for denying incumbent cable operators the same treatment as that available to entrants and overbuilders."). TCTA thus challenges SB 5's grandfathering provision on its face, seeking relief on behalf of all its members based on the words of the

---

[4] Because the pleadings and decisions below refer to TCTA, petitioner will use that name for respondent throughout.

statute and without reference to any particular applications of the statute to any of its members.

AT&T Texas moved to dismiss TCTA's complaint on the ground that the facial challenge could not withstand scrutiny under *Salerno*. In particular, AT&T Texas argued that TCTA's core legal theories rested on a premise — that SB 5 imposes a greater burden on incumbent cable operators than on overbuilders — that was not true in all cases. In particular, TCTA's own complaint and the record before the Texas Legislature establish that incumbents' existing municipal franchises are *not* universally more burdensome than state-issued franchises. *See* AT&T Texas Mot. To Dismiss 19-20 (Nov. 10, 2005). In many parts of Texas, moreover, incumbents face no competition from any video provider, even after the enactment of SB 5, and there is consequently no overbuilder against which a TCTA member competes. In those areas, SB 5 could not plausibly be said to "discriminate" unlawfully between the incumbent and its competitors. *See id.* at 20. Because TCTA had not alleged and could not allege that SB 5 was unlawful in all its applications to all TCTA members, AT&T Texas argued that TCTA's facial challenge could not proceed.

The district court granted AT&T Texas's motion to dismiss. *See* Pet. App. 25a-26a. Applying the standard announced in *Salerno* — that a facial challenge requires a plaintiff to show that all applications of a statute are unlawful — the district court held that TCTA had not stated a proper facial challenge because TCTA did not allege that SB 5 disadvantaged incumbent cable operators in all applications. *See id.* at 25a. The court further held that TCTA lacked standing to pursue its claims because it had not

alleged "any concrete cognizable harm suffered by any of its members." *Id.* The court dismissed TCTA's claims without prejudice, permitting TCTA or any of its members to bring a new action if they could allege concrete harm resulting from specific applications of the statute.

2. The Fifth Circuit reversed. After concluding that TCTA had standing, the court rejected AT&T Texas's argument that TCTA's complaint failed to allege that SB 5 was unlawful "in every application," and thus could not satisfy *Salerno*'s standard. Pet. App. 16a n.4. Citing the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41 (1999), in which three members of this Court questioned *Salerno*, the Fifth Circuit held that the rules relating to facial challenges are merely a "species of third party . . . standing" that apply only when a party seeks to vindicate the rights of third parties not before the court. Pet. App. 16a n.4 (internal quotation marks omitted). Having narrowly defined when the "every application" standard of *Salerno* is applicable, the Fifth Circuit concluded that the standard was not controlling in the posture of this case because "TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court." *Id.* The Fifth Circuit thus merged the question whether TCTA could pursue a facial challenge with the question whether TCTA had "associational standing." *Id.* ("[t]he proper inquiry is therefore one of associational standing"). Because, in its view, TCTA had adequately alleged associational standing, the court held that AT&T Texas's *Salerno* argument "lack[s] merit" and that TCTA's facial challenge to SB 5 should not have been dismissed. *Id.*

The Fifth Circuit denied AT&T Texas's petition for en banc review.

REASONS FOR GRANTING THE PETITION

This Court's precedent establishes that *Salerno*'s no-set-of-circumstances standard applies when an association seeks broad invalidation of a statute on behalf of its members, no less than when it invokes the rights of third parties not before the court. The Fifth Circuit's contrary holding divides the courts of appeals: the Second and Eleventh Circuits have squarely held in analogous circumstances that, under *Salerno*, an association may pursue a facial challenge only if it alleges that all applications of the challenged law to its members are unlawful.

This circuit split is of substantial jurisprudential and practical importance. By relaxing the standards for an association to pursue a facial challenge, the Fifth Circuit's decision will encourage associational suits as a means of circumventing the strictures of *Salerno*, thereby undermining the important principles of judicial restraint furthered by that decision. This Court's review is needed to resolve the conflict among the circuits on this important legal issue that lies at the core of the relationship between judicial and legislative bodies.

I. THE COURTS OF APPEALS ARE DIVIDED ON THE APPLICATION AND VITALITY OF *SALERNO*'S LEGAL STANDARD

In holding that TCTA could maintain a facial challenge to SB 5 on behalf of it members even though TCTA had not alleged that all applications of SB 5 to its members are unlawful, the Fifth Circuit created a sharp split with decisions of the Second and Eleventh Circuits. Certiorari is warranted to resolve the divide

in the courts of appeals and to address continuing confusion concerning the scope and vitality of this Court's decision in *Salerno*.

A. The Decision Below Conflicts With Decisions Of The Second And Eleventh Circuits

The court of appeals held that TCTA could maintain a facial attack on SB 5 notwithstanding that TCTA did not, because it could not, allege that all applications of SB 5 to its members are unlawful. Based on its reading of the plurality opinion in *Morales*, the Fifth Circuit reasoned that the rule of *Salerno* was not relevant because "TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court." Pet. App. 16a n.4.[5]

That holding puts the Fifth Circuit in conflict with the Second and Eleventh Circuits, each of which has held that *Salerno* precludes a facial challenge when an association seeking relief on behalf of its members does not allege that all applications of the challenged statute to its members are unlawful.

In *Rent Stabilization Association v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), an association of building owners,

---

[5] The Fifth Circuit's narrow view of *Salerno* is not an isolated phenomenon. The Ninth Circuit has likewise read *Morales* to suggest that "the *Salerno* rule" is "a species of third-party standing"; unlike the Fifth Circuit, however, the Ninth Circuit elected to follow *Salerno*'s no-set-of-circumstances formulation "[u]ntil a majority of the Supreme Court directs otherwise." *Hotel & Motel Ass'n v. City of Oakland*, 344 F.3d 959, 971, 972 (9th Cir. 2003). In addition, the Sixth Circuit has suggested, again in dicta, that "facial challenges are normally rejected because a person to whom the statute may be constitutionally applied may not challenge the statute on behalf of third parties." *Simon v. Cook*, 261 F. App'x 873, 883 (6th Cir. 2008).

"on behalf of its members," challenged New York City's rent-stabilization rules on the basis that they effected an unconstitutional taking. *Id.* at 592-93. The association sought "declaratory and injunctive relief from [the city's] rent stabilization scheme" only "on behalf of its members," not, for example, on behalf of all landlords in New York City affected by the regulations. *Id.* at 592.

Applying *Salerno*, the Second Circuit held that, to maintain such a facial challenge, the association needed to establish that "no set of circumstances exists under which the challenged act would be valid." *Id.* at 595 (internal quotation marks, brackets, and emphasis omitted). The court of appeals held the association could not carry that burden. The association's allegation that "'*many*'" of its members "are victims of a taking" implicitly conceded that the challenged rules "ha[d] not abridged the constitutional rights of those landlords who *do* obtain an adequate return." *Id.* The court held that, "far from alleging" the New York rules "act unconstitutionally in every circumstance," the complaint's allegations made clear that "takings occur in only limited subcategories of possible circumstances." *Id.* Consequently, the Second Circuit explained, "the proper recourse is for the aggrieved individuals themselves to bring suit." *Id.* (internal quotation marks omitted).

The Eleventh Circuit likewise applied *Salerno* to bar a facial challenge brought by an association on behalf of its members. In *Georgia Cemetery Association, Inc. v. Cox*, 353 F.3d 1319 (11th Cir. 2003) (per curiam), an association of cemetery owners brought, among other claims, a constitutional takings claim against the Georgia Cemetery and Funeral Services Act of 2000. The Georgia statute "set[] a $50 fee

limit for both the transfer of burial rights from one purchaser to another and assisting in the 'sitting' of a monument on a burial plot." *Id.* at 1320. The association "assert[ed], on behalf of its members, that the [state statute] ... unconstitutionally prevent[ed] its members from contracting to establish a price greater than $50 to site a monument on the lot on which it is to be installed in its members' cemeteries and from contracting to establish a price greater than $50 to transfer burial rights." *Id.* at 1322.

Though the plaintiff association sought relief only "on behalf of its members," the Eleventh Circuit invoked the standard of *Salerno* that a "'challenger must establish that *no set of circumstances exists* under which the Act would be valid.'" *Id.* (quoting *Salerno*, 481 U.S. at 745). The association's challenge failed to meet that standard. The Eleventh Circuit reasoned that "there would be no taking from a Georgia private cemetery that does not charge greater than $50 for the transfer of burial rights from one individual to another or for a monument siting." *Id.* "Under those circumstances," the Eleventh Circuit explained, "there would not be grounds for alleging an unconstitutional taking as to *all* of its members." *Id.* (emphasis added). Accordingly, the association's facial challenge on behalf of each of its members did not succeed "because the economic impact of these provisions will vary depending upon the economic circumstances of each of its members." *Id.*

The decisions of the Second and Eleventh Circuits teach that *Salerno* applies even when an association seeks relief only on behalf of its members. Both courts held, contrary to the Fifth Circuit's decision in this case, that an association in such circumstances

carries the burden of pleading and proving that *all* applications of the challenged law *to its members* are unlawful. If this case had arisen in the Second or Eleventh Circuits, TCTA would not have been able to evade *Salerno*'s standard by seeking relief exclusively on behalf of its members and forswearing any claim for relief on behalf of third parties.[6]. Rather, the inquiry would have been whether TCTA had sufficiently alleged that all the applications of SB 5 to its members are unlawful. Because, as discussed below, TCTA did not make — and cannot make — that essential allegation, the Fifth Circuit's split with the Second and Eleventh Circuits on the applicability of *Salerno* is outcome-determinative.

This Court's review is thus warranted to secure uniformity in the application of *Salerno*'s no-set-of-circumstances rule to a facial challenge brought by an association on behalf of its members.

B. The Decision Below Deepens Confusion In The Federal Courts Regarding *Salerno*

Apart from the question of *Salerno*'s applicability to associational challenges, the decision below adds to the confusion among the federal courts on the threshold question whether *Salerno* remains good law. The centerpiece of AT&T Texas's presentation below was *Salerno*'s no-set-of-circumstances standard. TCTA, in turn, suggested that *Salerno* is not controlling in light of the plurality opinion in *Morales*.[7] Following TCTA's lead, the Fifth Circuit

---

[6] *See* TCTA C.A. Reply Br. 16-17 (arguing that *Salerno* is "[i]napplicable" because "TCTA does not seek relief going beyond its members").

[7] *See* TCTA C.A. Reply Br. 8 & n.18 (relying on plurality in *Morales* rather than *Salerno*); *id.* at 18 & n.47 (arguing that *Salerno* does not apply to equal-protection claims); TCTA Br. in

turned to the plurality in *Morales* for guidance and declined to apply the legal standard articulated in *Salerno*. *See* Pet. App. 16a n.4.

The Fifth Circuit's decision to disregard *Salerno* in favor of *Morales* deepens confusion in the courts of appeals regarding the vitality of *Salerno*. As the Ninth Circuit has explained, "[j]urisprudence appears to be divided on the question whether the *Salerno* 'no set of circumstances' standard is dicta or whether it is to be generally applied to facial challenges." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007). Indeed, numerous courts of appeals have expressed uncertainty concerning the extent to which *Salerno* remains controlling law. *See, e.g.*, *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) ("Justices of the Supreme Court disagree about the correctness of *Salerno*'s statement that a facial challenge is impossible unless 'no set of circumstances exists under which the Act would be valid'"); *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 n.5 (10th Cir. 2006) (the Supreme Court "has been less than clear as to what a party must show in order to succeed" in the posture of a "facial challenge"); *Rothe Dev. Corp. v. Department of Defense*, 413 F.3d 1327, 1337 (Fed. Cir. 2005) (*Salerno* "has been criticized in several subsequent Supreme Court cases," but "the *Salerno* language has not been expressly disapproved by the Supreme Court"); *United States v. Rybicki*, 354 F.3d 124,

---

Opp. to Motions To Dismiss 26 & n.111 (citing *Morales* for the view that *Salerno* may not be "apposite" or "good law"); Dist. Ct. Motions Hearing Tr. 69:22-24 (May 22, 2006) ("We don't know if [the no-set-of-circumstances standard is] actually the right standard. It's the standard that comes from a case, *United States versus Salerno*, which has been subject to some criticism.").

131 (2d Cir. 2003) (en banc) (refusing to follow the *Morales* plurality's construction of facial-challenge doctrine because "a majority of the Supreme Court has not" voted to reexamine *Salerno*).

This Court's review is therefore independently warranted to resolve this continuing confusion over whether and to what extent *Salerno* remains good law in the wake of this Court's fractured decision in *Morales*. *Cf. Nichols v. United States*, 511 U.S. 738, 746 (1994) ("confusion following a splintered decision [of this Court] is itself a reason for reexamining that decision").

II. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND WITH THE PURPOSES UNDERLYING FACIAL-CHALLENGE RULES

The divide among the courts of appeals and the confusion in federal courts regarding *Salerno* are more than sufficient to warrant this Court's review. Plenary review in this case is particularly appropriate, however, because the Fifth Circuit's decision is wrong: it conflicts with decisions of this Court and undermines the purposes served by limits on facial challenges.

A. The Decision Below Conflicts With Decisions Of This Court

This Court stated in *Salerno* that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully" because "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745; *see Keyishian v. Board of Regents*, 385 U.S. 589, 594-95 (1967) (facial challenge cannot succeed when a statute is "capable of constitutional applica-

tion"). This standard reflects the view that as-applied challenges are the preferred course of constitutional adjudication and that "facial challenges are best when infrequent." *Sabri v. United States*, 541 U.S. 600, 608 (2004). *Salerno*'s standard further reflects the principle that courts should not "nullify more of a legislature's work than is necessary" and should "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006).

The decision below cannot be reconciled with those principles. *See* Pet. App. 16a n.4. Under *Salerno*, to proceed with a facial challenge on behalf of its members, TCTA must allege that SB 5 is unlawful in all applications to TCTA's members. That, in turn, requires TCTA to plead that all applications of SB 5 disadvantage TCTA's members. TCTA did not and cannot satisfy that standard.

First, TCTA failed to plead that SB 5 disadvantages its members in all applications; rather, even after amending its complaint, the most that TCTA could allege is that *some* municipal franchises are more onerous than state-level franchises. *See* First Am. Compl. ¶ 22 (municipal franchises "*tend* to be lengthy and comprehensive"; SB 5 franchises are "less onerous than the burdens that municipal franchises *generally* impose on cable operators") (emphases added). Those heavily qualified allegations show that TCTA is not alleging that *all* existing municipal franchises are more onerous than SB 5 franchises. Indeed, TCTA's allegations are, for present purposes, indistinguishable from those at issue in *Dinkins*, which the Second Circuit found were tantamount to a concession that not all applications of the New York

City rent-stabilization rules were unlawful. *See* 5 F.3d at 595.

The legislative record demonstrates *why* TCTA has not alleged that SB 5 burdens all its members in every application. The legislative debate on SB 5 revealed that the terms of some municipal franchise agreements — especially those negotiated with rural municipalities — are less burdensome for the cable operator than are the terms of an SB 5 franchise. Representative Gattis, for example, explained that towns in his legislative district had agreed with their incumbent cable operator on franchise fees that, at 3% of gross revenues, are substantially lower than the 5% of gross revenues franchisees must pay under SB 5. *See* Texas House Debate at 41-43; *id.* at 39 (statement of Rep. King) (noting that Weatherford has a municipal franchise agreement with a 4% gross revenue fee); *id.* at 48 (statement of Rep. Gattis) (franchise fee in Cameron is 3% of gross revenues); Tex. Util. Code Ann. § 66.005(a) (5% fee for state-issued franchises). In these circumstances, the Texas Legislature's failure to give TCTA's members the right to abrogate existing agreements — in order to opt-in to a state-issued franchise that would charge the incumbent a substantially higher franchise fee — could not possibly disadvantage the incumbents in any legally cognizable manner.[8]

---

[8] TCTA's contention that "all of its members are prepared to seek state-level franchises," Pet. App. 12a, does not alter this analysis. TCTA never alleged that each of its members *in each franchise area* would abrogate municipal franchises if afforded the chance. The most that TCTA could allege, even after amending its complaint, was that each of its members would renounce at least one, but not all, franchises. *See* First Am. Compl. ¶ 28.

Second, the legislative record showed that, in many parts of Texas, incumbents face no prospect of competition under SB 5, either from overbuilders or from new entrants. *See Perryman Report* at 7-8. The central theory of TCTA's case is that the Texas Legislature unlawfully treats incumbents differently from overbuilders. *See supra* p. 8. Yet TCTA seeks an across-the-board remedy that would allow incumbents to abandon their franchise agreements *everywhere* in the State — based on purportedly discriminatory treatment of incumbents and overbuilders — even in municipalities where no overbuilders exist.

This Court's precedent forecloses such an expansive claim for relief. In *Ayotte*, this Court explained that, "when confronting a constitutional flaw in a statute, [a court must] try to limit the solution to the problem." 546 U.S. at 328. Courts should accordingly "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Id.* at 328-29. That presumption against broad invalidation rests on the precept that a court should not "nullify more of a legislature's work than is necessary," and thus "the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 329 (internal quotation marks omitted; ellipsis in original).

Ayotte controls the outcome here. TCTA's attempt to invalidate SB 5's grandfathering provision across the board — even in areas of Texas where TCTA's members are unaffected by, or benefit from, SB 5 — is contrary to the teaching of *Salerno* and *Ayotte* that only unlawful applications of a statute should be remedied. For these reasons, the Fifth Circuit's

rejection of AT&T Texas's objections to TCTA's facial challenge as "lack[ing] merit" cannot be reconciled with this Court's decisions. Pet. App. 16a n.4.

B. The Fifth Circuit Erred In Concluding That *Salerno*'s Standard Is Nothing More Than A Limit On Third-Party Standing

The Fifth Circuit allowed TCTA to maintain a facial challenge to SB 5 solely because "TCTA is only asserting the interests of its members . . . , rather than the interests of third parties." Pet. App. 16a n.4. The upshot of the Fifth Circuit's decision is that *Salerno*'s standard is irrelevant on a motion to dismiss so long as a plaintiff association does not invoke third-party rights, no matter how broadly the plaintiff frames its challenge or the requested relief. That understanding of *Salerno* is deeply flawed.

Salerno's no-set-of-circumstances standard is more than a rule of third-party standing. The rule operates to limit the scope of any challenge that a plaintiff may bring against a statute: if there are instances in which a statute can be applied lawfully, then a broad, across-the-board challenge to the statute must fail. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) ("to prevail on a facial attack the plaintiff must demonstrate that the challenged law . . . could never be applied in a valid manner") (internal quotation marks omitted); *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 469 (7th Cir. 2002) (when court can "envision several scenarios" where statute is lawful, "facial attack" must "fail[]"); *Sanitation & Recycling Industry, Inc. v. City of New York*, 107 F.3d 985, 994 (2d Cir. 1997) (law phasing out contracts was not facially invalid because, "in some cases, *e.g.*, those where the contract is about to expire . . . , the impairment caused

by the law will be slight"; court thus could not "conclude that the statute may not under any circumstances be found constitutional"). Relief must instead be sought on an individualized basis, challenging only those applications of the law that (on the plaintiff's own theory) are unlawful.

That a party has not invoked the rights of third parties (and thus disclaims a challenge to a certain subset of a statute's applications) does not render *Salerno*'s standard inoperative. Rather, *Salerno* applies when a plaintiff seeks to invalidate all applications of a statute to itself (or to its members, as TCTA does here) no less than when it seeks to invalidate all applications of a statute to third parties.[9] TCTA therefore may not maintain a challenge to *all* applications of SB 5's grandfathering provision to *each* of its members in *every* municipality across Texas if there are some applications of the statute to some of TCTA's members in some municipalities that are lawful. It is irrelevant to that analysis that TCTA is not seeking relief on behalf of parties other than its own members.

The Fifth Circuit's contrary rule would frustrate the purpose of limiting facial challenges. This Court has recently emphasized the "disfavored" nature of facial challenges, explaining that "[c]laims of facial

---

[9] *See, e.g.*, *Arriaga v. Mukasey*, 521 F.3d 219, 224 n.2 (2d Cir. 2008) (facial challenge fails where party "cannot establish that the statute is vague in his own case"); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1078 (D.C. Cir. 2003) (rejecting facial challenge where plaintiff's "own case represents a 'set of circumstances' under which the [statute] may constitutionally be applied"); *Dinkins*, 5 F.3d at 592-93; *see also Morales*, 527 U.S. at 80 n.3 (Scalia, J., dissenting) (under *Salerno*, plaintiff must show infringement of all "third-party rights" "in addition to" all of "[plaintiff's] own rights").

invalidity often rest on speculation" and thus invite "premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (internal quotation marks omitted). "Facial challenges," moreover, "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotations marks omitted). In addition, decisions based only on the "facial requirements" of a statute mean that adjudication occurs in a vacuum before a State has had an "opportunity to implement [a statute], and its courts have had . . . occasion to construe the law in the context of actual disputes." *Id.* at 1190.

TCTA's suit implicates all those concerns. As the district court correctly concluded, TCTA seeks broad invalidation of a state statute on its face. *See* Pet. App. 23a-25a ("TCTA's claims cannot be considered by the Court until TCTA can present a specific controversy for judicial resolution" because the court would otherwise be called upon to "frustrate the expressed will of a state legislature" based only on "hypothetical cases"). Further, TCTA seeks a windfall remedy that would allow each of its members to abrogate their existing municipal franchise agreements — subverting the Texas Legislature's efforts to balance the goal of promoting video competition and the need to protect municipalities' reliance interests — even in areas of Texas where TCTA's members cannot plausibly claim to be disadvantaged by SB 5. TCTA's proposed remedy is thus inconsistent

with the principle that courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte*, 546 U.S. at 328-29; *see Washington State Grange*, 128 S. Ct. at 1191 ("facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution").

III. THE LEGAL ISSUE RAISED BY THE PETITION IS IMPORTANT AND IS PROPERLY ADDRESSED NOW

A. The legal issue raised in this petition has profound jurisprudential and practical importance. *Salerno* and other limits on facial challenges provide crucial restraints on the ability of the federal judiciary to disrupt the acts of legislative bodies. *See* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 361 (1998) (facial challenges invite a "robust role for the federal courts in reviewing legislative enactments," in "substantial tension with core principles underpinning Article III courts that require resolution of concrete disputes, general deference to the legislative process, and determination of constitutional questions as a matter of last resort and on a limited basis"). This Court has recently identified the significant interests served by limiting the instances in which parties may seek broad judicial remedies that would nullify legislative acts. *See Washington State Grange*, 128 S. Ct. at 1191. In light of those structural interests served by *Salerno*'s standard and the rules governing facial challenges, clarity with respect to the scope and application of these rules is imperative.

Every constitutional challenge to a state or federal statute is potentially implicated by *Salerno*'s rule that a facial challenge may not succeed unless there is "no set of circumstances . . . under which the [statute] would be valid." 481 U.S. at 745. Potential litigants have a significant interest in knowing the burdens they will shoulder should they choose to pursue facial claims. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1334-35 (2005) ("[f]acial and as-applied challenges present drastically different ways of enforcing constitutional rights," and the "differences" between the challenges "have enormous practical significance" for litigants). This Court's review would thus bring clarity to questions that have a practical effect on litigation across the country.

Beyond that, a reading of *Salerno* that limits it to a rule of third-party standing renders associational facial challenges a far more attractive vehicle for attacking a statute's validity. If an individual member of TCTA brought a challenge to SB 5 seeking to abrogate an existing municipal franchise agreement, that challenge would fail at the threshold if the incumbent were unable to allege that it faced competition in the municipality at issue and that it would be worse off under its existing agreement than it would be under SB 5. In this case, however, TCTA seeks to obtain for that same incumbent identical relief through an associational facial challenge that, under the Fifth Circuit's decision, requires no such allegation of competition or relative burden. Allowing parties to obtain through associational challenges what they cannot obtain through individual challenges not only defies common sense, but also will encourage litigants to bring constitutional challenges to state

and federal statutes as all-encompassing associational facial challenges — a result at odds with the principle that adjudication is best when it addresses particular, concrete applications of law. *See United States v. Raines*, 362 U.S. 17, 20-22 (1960); *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912).

Finally, this Court's review is necessary because the question presented will not resolve itself. The issue has already divided the courts of appeals, and it is unlikely to be resolved absent intervention by this Court in view of the federal courts' professed inability to resolve the meaning of *Salerno* in the wake of both the *Morales* plurality and continuing criticism of *Salerno*'s legal standard. *See* pp. 15-17; *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Stevens, J., concurring in the judgment) (suggesting this Court has never followed *Salerno*, not even in *Salerno*).

B. This is an appropriate vehicle to resolve the question presented. The case squarely presents the issue, which is a pure question of law that involves, among other things, interpretation of *Salerno* and the fractured opinions in *Morales*. The legal question, moreover, was fully briefed before the district court and the court of appeals, and was passed upon by both lower courts.

The interlocutory nature of the court of appeals' decision does not weigh against this Court's review. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern *et al.*, *Supreme Court Practice* 259 (8th ed. 2002).

Indeed, this Court often grants certiorari to review interlocutory decisions addressing important threshold issues. *See, e.g., Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).[10] Given the dispositive nature of AT&T Texas's challenge to TCTA's facial attack on SB 5's grandfathering provision, and because the question presented will affect significantly the manner in which further proceedings are conducted, resolution of this important question need not and should not wait.[11]

---

[10] The unpublished nature of the Fifth Circuit's decision is likewise no bar to this Court's review. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (noting that this Court "granted certiorari" to review "an unpublished disposition" by the Sixth Circuit); *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., joined by O'Connor & Souter, JJ., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit[.]"). That is particularly so given that the Fifth Circuit's decision may well have pernicious effects outside the Fifth Circuit. *See* Fed. R. App. P. 32.1; 5th Cir. R. 28.7.

[11] Upon remand to the district court after the Fifth Circuit's decision, Time Warner Cable was added as a plaintiff. Plaintiffs have asserted that this addition moots facial-challenge issues. That is incorrect. The Second Amended Complaint contains the same substantive allegations as the other complaints: even with Time Warner Cable in the case, for example, TCTA continues to seek a broad judicial decree that would apply in municipalities across Texas without regard to the actual burdens faced by incumbents in each municipality. Furthermore, the new complaint does not allege that SB 5's grandfathering provision imposes discriminatory burdens in all its applications *even* as to Time Warner Cable itself. As explained, an individual plaintiff cannot secure relief in municipalities where it is not harmed by or is better off under SB 5. *See supra* p. 25. Even with respect to Time Warner Cable, then, the complaint

IV. ALTERNATIVELY, THE COURT SHOULD VACATE AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *WASHINGTON STATE GRANGE*

For the reasons stated above, this Court's plenary review is warranted. In the alternative, this Court should grant the petition, vacate the court of appeals' judgment, and remand for further consideration in light of the Court's recent decision in *Washington State Grange*.

In *Washington State Grange*, this Court — while noting that *Salerno*'s precise standard has been criticized — emphasized that "all [members of the Court] agree that a facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1190 (internal quotation marks omitted). Even that consensus standard for measuring facial challenges compels dismissal of TCTA's complaint, because there are "plainly" instances in which SB 5's grandfathering provision may be "legitimate[ly]" applied to TCTA's members. Those circumstances include instances both in which an existing agreement is more favorable to the incumbent than an SB 5 franchise would be and in which a TCTA member faces no competition from an overbuilder in a municipality in which it operates under a local franchise agreement. *See supra* pp. 18-21. Those lawful applications of SB 5's grandfathering provision prevent TCTA as a matter of law from maintaining a challenge to all applications of SB 5 to each of its members. Under the guidance provided by this Court in *Washington State Grange*, those applications of SB 5 suffice to show

---

does not satisfy *Salerno*'s requirement that a plaintiff raising a facial challenge allege that there are no lawful applications of the statute to itself.

that SB 5 has a "plainly legitimate sweep" and thus that TCTA's facial challenge on behalf of each of its members must fail. *See also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (plurality) ("[a] facial challenge must fail where the statute has a plainly legitimate sweep") (internal quotation marks omitted).

Washington State Grange also makes clear that facial-challenge rules serve as more than restrictions on third-party standing, thus directly contradicting the Fifth Circuit on this point. *See* Pet. App. 16a n.4. This Court held that facial challenges are disfavored "for several reasons," including because they require courts to "anticipate a question of constitutional law in advance of the necessity of deciding it" and to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 128 S. Ct. at 1191 (internal quotation marks omitted); *see supra* pp. 22-23. Those rationales go well beyond, and indeed have nothing to do with, concerns about litigants raising the rights of third parties. Because the Fifth Circuit's decision rests on a different (and narrower) understanding of the purposes of limits on facial challenges, this intervening decision undermines the basis for the decision below. In these circumstances, the Court should at a minimum grant the petition, vacate the judgment below, and remand for further consideration.

CONCLUSION

The Court should grant review of the Fifth Circuit's judgment. In the alternative, the petition should be granted, the court of appeals' judgment should be vacated, and the case should be remanded for further consideration in light of *Washington State Grange*.

Respectfully submitted,

JAVIER AGUILAR
TRACY TURNER
AT&T SERVICES, INC.
175 E. Houston
San Antonio, Texas 78205
(210) 351-3428

MICHAEL K. KELLOGG
Counsel of Record
COLIN S. STRETCH
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

June 12, 2008